No. 13-990

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* EUROCLEAR BANK SA/NV IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Euroclear Bank SA/NV ("Euroclear Bank") is not a party to this proceeding, but it is named in the Amended February 23, 2012 order of the District Court (the "Order") (copy contained in Appendix E to the Republic of Argentina's Petition for Certiorari ("Petition")).[1] The Order provides (at page 5) that "Participants" shall be bound by its terms, and defines "Participants" to include "the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including, but not limited to . . . Euroclear Bank SA/NV . . . .)" Order at page 6.

Euroclear Bank submits this brief in support of the Petition in order to explain how the Order (a) violates due process constraints on the assertion of adjudicatory authority and (b) poses risks to international comity.

INTRODUCTION

Euroclear Bank is a user-owned and user-governed commercial bank and securities settlement system incorporated in Belgium. It is regulated by the National Bank of Belgium and has its registered office at 1 Boulevard du Roi Albert II, B-1210 Brussels, Belgium.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief.

Euroclear Bank provides settlement and related securities services for cross-border transactions involving domestic and international bonds, equities, investment funds and derivatives. Its clients are major financial institutions located in more than 90 countries. Euroclear Bank holds securities and book-entry interests in securities for participating organizations and facilitates the clearance and settlement of securities transactions through electronic book-entry changes in accounts of such participants.

The value of securities held for Euroclear Bank clients at the end of 2011 was a record € 10.8 trillion. The value of transactions settled was € 328.5 trillion in 2011.

As a custodian of securities for its clients, Euroclear Bank receives income and redemption payments from third parties appointed by issuers and then credits such amounts to its account holders. Euroclear Bank does not act on behalf of securities issuers. Its obligations are solely to its clients/account holders. Some of its clients/account holders own the Exchange Bonds which are at issue in this case and keep those bonds in accounts at Euroclear Bank.

Euroclear Bank conducts no banking operations in the United States. It maintains a small representative office in New York for client relationship and support purposes.

ARGUMENT

THE ORDER OF THE DISTRICT COURT VIOLATES DUE PROCESS AND PRINCIPLES OF COMITY

The Court of Appeals rejected every argument advanced against the Order seriatim, as if all were equally lacking in merit and unworthy of serious consideration.

In doing so, it paid insufficient attention to (A) the due process constraints on the assertion of adjudicatory authority and (B) the risks to international comity posed by its expansive view of the reach of the Order.

A. Due Process Precludes the Exercise of Adjudicatory Authority over the Foreign Actions of Foreign Entities which have no Substantial Effect within the United States

It is well established that the jurisdiction of a state with respect to prescribing law concerning matters taking place outside of its own territory is limited to: conduct that has or is intended to have substantial effect within its territory; the activities, etc., of its own nationals; and conduct that is directed against the security of the state or a limited class of other state interests. Restatement (Third) of Foreign Relations Law of the United States ("Restatement"), Section 402.

It is undisputed that the banking activities of Euroclear Bank take place outside of the U.S.; that Euroclear Bank is not a U.S. national; and that Euroclear Bank's banking activities are not directed against the security or other interests of the U.S.

The Court of Appeals assumed, however, without any evidentiary or factual basis, that the transmittal of payments to the Exchange Bondholders would constitute conduct that has or is intended to have a substantial effect within the U.S. (727 F.3d at 243). Accordingly, the Court of Appeals apparently believes that it has jurisdiction to proscribe such payments. However, the determination that the transmittal of payments has or is intended to have a substantial effect within the U.S. is not supported by any citation to the record.

Instead, the Court of Appeals supports its conclusion that the Order can bind conduct, "regardless of whether that conduct occurs here or abroad" (727 F.3d at 243-44), with the statement that otherwise the Order "'will be entirely for naught'" (727 F.3d at 244).

The circular nature of the Court's reasoning is self-evident. The Court posits that it has jurisdiction over activities in foreign countries because otherwise the Court's order concerning those activities would be "for naught." The Court further holds that it can reach steps in the payment process that take place overseas because it is "necessary" to do so if the Order is to be enforced (727 F.3d at 244).

But these "reasons" are not reasons at all—they are mere tautologies. If the Order enjoined all of the activities of everyone everywhere in the world, one could equally well assert that the court had jurisdiction over everyone everywhere because, if it did not, the Order could not be enforced.

The Court of Appeals says that parties "outside the jurisdiction or reach of the district court . . . may assert as much if and when they are summoned to that court" (727 F.3d at 244), but this is a hollow promise at best, and a frivolous promise at worst.

The Court of Appeals has already assumed that the payments are intended to have a substantial effect with the U.S., so what possible argument can there be against the assertion of jurisdiction over the participants in that process?

The Court of Appeals says that the Order enjoins "no one but Argentina" (727 F.3d at 244), but only two sentences earlier it notes that the Order names Euroclear Bank and others. Indeed, the Order states expressly that ". . . Participants [a defined term which

includes Euroclear Bank] shall be bound by the terms of this ORDER as provided by Rule 65(d) (2) and prohibited from aiding and abetting any violation of this ORDER . . . "Order at p. 5. If words have any meaning, Euroclear Bank *is* being enjoined.

Euroclear Bank and its counsel cannot interpret the Order and the decision of the Court of Appeals in any other way. Certainly counsel cannot advise Euroclear Bank that it can safely remit payments. No reasonable person would risk contempt based on the assumption that the Order does not mean what it says, or that the Court of Appeals will reverse itself when the absurdity of its ruling is brought to its attention.

This Court recently had occasion to highlight the importance of careful attention to due process constraints on the exercise of jurisdiction and to hold that unduly exorbitant exercises of personal jurisdiction "are barred by due process constraints on the assertion of adjudicatory authority." *Daimler v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 751 (2014).

As in *Daimler*, so here, the lower courts' exercise of jurisdiction is exorbitant. As in *Daimler*, so here there is no basis for an assertion of general jurisdiction. Euroclear Bank is not a U.S. national and cannot be said to be "at home" in the U.S. *See Daimler*, *supra*, 134 S. Ct. at 758, n.11.

Euroclear Bank does maintain a foreign representative office in New York pursuant to Article V-B of the New York Banking Law, but, under *Daimler*, that fact alone is insufficient to support the exercise of general jurisdiction over Euroclear Bank, *i.e.*, jurisdiction over any and all claims against Euroclear Bank without regard to whether they arise from its operation in New York.

Here, however, the exorbitant exercise of jurisdiction is not a flagrant exercise of general jurisdiction: rather, it is a surreptitious exercise of specific jurisdiction.

The Court of Appeals, by predetermining that participation in the payment process is an act which has or is intended to have a substantial effect within the U.S., has fully established the groundwork for the conclusion that it has jurisdiction over participants in that process regardless of their nationalities, regardless of where their participation takes place, and regardless of whether their actions have any connection whatsoever to the U.S. (other than the assumed "substantial effect" in the U.S.). Such an assertion of jurisdiction clearly violates due process.

While the Court of Appeals says that it is not deciding the jurisdictional issue pertaining to nonparties, its assumption of such jurisdiction is contradictory.

As we have seen, the Court of Appeals has assumed that payments on the Exchange Bonds would have a substantial effect in the U.S., rendering participation in the payment process a violation of the Order. What impediment is there to the assertion of jurisdiction? Long-arm jurisdiction typically provides for jurisdiction based solely on wrongdoing in a foreign state which causes injury within the forum state. (*See, e.g.*, N.Y.C.P.L.R. §302(a)(3)). The courts below have already held that violations of the Order will cause injury in the U.S., so those who violate the Order may be subject to long-arm jurisdiction regardless of where they do so.

It is true that the law concerning the enforcement of injunctions permits enforcement against nonparties

who are outside of the territorial jurisdiction of the court even if they have no contacts with the forum other than the contacts involved in the activity by which the nonparty is violating the injunction. A leading commentator states that:

> If a nonparty with actual notice of an injunction actively aids and abets a party in violating the injunction, the nonparty may be subject to a contempt citation or other enforcement measure even if he or she resides outside the territorial jurisdiction of the district court and has no other contacts with the forum.

13 Moore's Federal Practice, §65.61 (emphasis added) (footnote omitted.) The key word here is "other"—*i.e.*, there need be no contacts with the forum "other" than those contacts arising from, relating to, or inherent in, the non-party's aiding and abetting activities.

In *Securities and Exchange Commission v. Homa*, 514 F.3d 661, 673-75 (7th Cir. 2008), for example, the Seventh Circuit upheld the exercise of jurisdiction over aiders and abettors who were located, and who acted, outside of the U.S. The court found, however, that their actions were part of an extensive scheme to defraud and were "designed to have a purpose and effect in the forum." 514 F.2d at 675. There is no basis for such a finding in this case—there is no assertion that Euroclear Bank designed its activities so as to have an effect in the U.S.

The court in *Homa* also found it significant that the aiders abettors who acted outside of the U.S. (in Dominica) (a) were U.S. citizens, (b) had acted "in concert" with the principal wrongdoer, and (c) "had been contumacious and untruthful" in the course of the proceedings. *Id*. Again, in the present case, there

could be no such findings. Euroclear is a Belgian entity; there is not even an allegation that it acted in concert with Argentina in any way, at any time, in any place; and Euroclear has not been "contumacious and untruthful" in U.S. court proceedings.

In the present case, there are no contacts with the U.S. as far as Euroclear Bank is concerned and the assertion of adjudicatory authority over Euroclear Bank to enforce the Order is improper under the principles set forth in Section 402 of the Restatement and in *Daimler*.

B. Considerations of Comity Require Reversal of the Order

The Court of Appeals mentions that the comity argument was made (727 F.3d at 243), but then pays little heed to that argument. It does not discuss the applicable principles of comity, nor does it acknowledge the direct conflict between the Order and the laws of foreign jurisdictions.

By the express inclusion of the European securities settlement systems as Participants in the Order, the District Court purports to regulate and control the conduct of institutions and activities with little or no connection to the United States.

The Exchange Bonds for which the Order attempts to constrain payment include a number of Euro-denominated instruments. These bonds are held entirely outside the United States and are governed by English law. The payments made on such bonds occur outside the United States.

The injunction issued by the District Court purports to enjoin payments made within the European System of Central Banks TARGET2 real-time gross cash

settlement system. Giving effect to the Order would expand the authority of the U.S. courts beyond the borders of the U.S. to activities carried out by governmental and other institutions in Europe. In the interest of comity, the Court should avoid such a result.

Moreover, the Order is in direct conflict with Belgian law as follows: in July 2003, an interest payment on bonds issued by Nicaragua was stopped by a Belgian lower court order served on Euroclear Bank at the request of LNC Investments which claimed that such interest payment was a breach of the *pari passu* provision in the governing documentation for such bonds. That court order prevented Euroclear Bank from accepting or making any payments in respect of Nicaragua bonds.

On appeal, the Brussels Court of Appeal reversed the court order in March 2004 and released Euroclear Bank from the blocking measures. The Court of Appeal found that Euroclear Bank was a third party to the loan agreement between Nicaragua Republic and its lenders (including the *pari passu* provision) and that, in such capacity, Euroclear Bank could not be forced to comply with any contractual obligation to treat debtors equally.

Following the Nicaragua case, Belgian law was amended to prevent any future Court orders similar to the July 2003 order. Article 9 of the Belgian Act of April 28, 1999 implementing the EU Settlement Finality Directive as amended by Article 15 of the Law of November 19, 2004 and by subsequent legislation provides:

> Any cash settlement account maintained with the operator of a system or with a cash settlement

> agent, as well as any cash transfer, through a Belgian or foreign credit institution, to be credited to such cash settlement account, cannot be attached, put under sequestration or otherwise blocked by any means by a participant (other than the operator or the settlement agent), a counterpart or a third party. [Euroclear Bank Translation]

According to the legislative history of Article 9 and its subsequent amendment, the purpose of this prohibition against attachment or other blocking of a cash settlement account or any cash transfer to be credited to such account is to avoid any impediment to the proper functioning of payment or settlement systems and hence to safeguard the credibility and the liquidity of national and international financial markets.

Considering this objective, the prohibition contained in Article 9 of the Belgian Act of April 28, 1999 implementing the EU Settlement Finality Directive should be regarded as established Belgian international public policy.

The implementation of the Order on the terms set by the District Court would likely lead to a direct violation of this rule of Belgian law to the extent that Euroclear Bank would be prohibited from receiving cash payments in relation to the Exchange Bonds from its correspondents and from crediting the cash so received to its clients' cash settlement accounts.

Conflicting legal requirement of this nature will impact the certainty underpinning the international bond markets and could cause a loss of confidence in the role of key market infrastructure providers. In the interest of comity, the Court should not permit any action which would interrupt or impair the smooth

functioning of the bond markets upon which so many governments and investors over the world rely so heavily, nor should it impose restrictions in Belgium which are directly contrary to Belgian law.

In *Daimler*, this Court chastised the Ninth Circuit because it "paid little heed to the risks to international comity its expansive view of general jurisdiction posed." 134 S. Ct. at 763. Likewise here, the Second Circuit has paid little heed to the risks to international comity posed by its expansive view of the appropriate parameters of injunctive relief.

In regard to comity, the parallels between this case and *F. Hoffman LaRoche Ltd. v. Empagran S. A.*, 542 U.S. 155, 124 S. Ct. 2359 (2004) (hereinafter "*Empagran*") are striking. *Empagran* involved the scope of subject matter jurisdiction under a statute, but the principles and analysis applied by this Court in *Empagran* have equal applicability and force where the scope and reach of an injunction are at issue.

Specifically, as in *Empagran*, where foreign conduct causes foreign harm, it is not reasonable to apply American law to it (542 U.S. at 163-67). As this Court noted, customary international law limits the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another state (542 U.S. at 164, citing Restatement §§ 403(1), 403(2) (1987)). The Order is prescriptive and indisputably runs afoul of this bedrock principle.

Indeed, the present case is even more egregious than *Empagran* was. In *Empagran*, the Court discussed the conflicts between U.S. and foreign antitrust law and noted that there were some similarities and some differences (542 U.S. at 167-68). Here, the Order directly conflicts with Belgian law. The Order

prohibits payment, but Belgian law prohibits such a prohibition.

Accordingly, considerations of comity require reversal of the Order.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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